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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 176

GULF, MOBILE & OHIO RAILROAD COMPANY,
A CORPORATION,

Petitioners,

vs.

JAMES B. MAXIE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

RICHARD WAYNE ELY,
Counsel for Petitioner.

D. S. WRIGHT,
L. DUNCAN LLOYD,
ROBERT C. ELY,
Of Counsel.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	2
Jurisdiction	2
Statute involved	3
Questions presented	3
Statement	5
Basis of opinion of the state court	7
Reasons for granting the writ	8
Prayer for writ	12
Brief in support of petition for certiorari	14
Statement of case	14
Specifications of error to be urged	14
Argument	15
Conclusion	32
Appendix	34

Table of Cases Cited

Baird v. *New York Central R. Co.*, 86 N.Y.S. (2d) 49, 11, 27, 28

Brooks v. *Southern Pacific Co.*, 207 U. S. 463 12

Chicago & Northwestern Ry. Co. v. *Bolle*, 284 U. S. 74, 76 L. Ed. 153 23

Howard v. *Illinois Central Railroad Co.*, 207 U. S. 463, 52 L. Ed. 297 12, 30

Industrial Accident Commission v. *Davis*, 259 U. S. 182, 66 L. Ed. 888 10, 20

Maxie v. *Gulf, Mobile and Ohio Railroad Co.*, 356 Mo. 633, 202 S. W. (2d) 904 7, 16, 26

Maxie v. *Gulf, Mobile & Ohio Railroad*, 219 S. W. (2d) 322 2

Minneapolis & St. Louis Railroad Co. v. *Winters*, 242 U. S. 353, 61 L. Ed. 358 10, 11, 22

Mondou v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 56 L. Ed. 327 12, 31

New York, N. H. & H. R. Co. v. *Bezue*, 284 U. S. 415, 76 L. Ed. 370 11

Page

Oglesby v. *St. Louis-San Francisco Ry. Co.*, 318 Mo. 79, 1 S. W. (2d) 172 11
Propst v. *Spitznagle*, 215 Ind. 402, 19 N. E. (2d) 263 11
Rice v. *Baltimore & O. R. Co.*, 42 F. (2d) 387 11
Shanks v. Delaware, Lackawanna & Western Railroad Co., 239 U. S. 556, 60 L. Ed. 436 ..... 10, 23
Sullivan v. *New York, N. H. & H. R. Co.*, 74 Fed. (2d) 725 ..... 10, 11
Toussaint v. *Cleveland, C. C. & St. L. Ry. Co.*, 340 Mo. 578, 104 S. W. (2d) 263 11
Wilkerson v. *McCartky*, — U. S. —, 93 L. Ed. 16 2

STATUTES CITED

Constitution of the United States:
Article I, Sec. 8, Clause 3 4
Tenth Amendment 12
Federal Employers' Liability Act as amended by the Act of August 11, 1939, c. 685, sec. 1, 53 Stat. 1404, 45 U.S.C.A. Sec. 51 ..... 1, 2, 3, 5, 7, 8, 12, 16

OTHER AUTHORITY CITED

Senate Reports, 76th Congress 1st Sess., Rep. No. 661 25

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 176

GULF, MOBILE & OHIO RAILROAD COMPANY,
A CORPORATION,

Petitioners,

vs.

JAMES B. MAXIE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Gulf, Mobile and Ohio Railroad Company, a corporation, respectfully petitions for a Writ of Certiorari to review the final judgment and decision of the Supreme Court of Missouri, the highest Court of that State, affirming a judgment for Sixteen Thousand Dollars ($16,000.00) in favor of James B. Maxie and against your petitioners, in an action brought under the Federal Employers' Liability Act as amended by the Act of August 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. Sec. 51.

Opinions Below

The opinion of the Supreme Court of Missouri is reported in *Maxie* v. *Gulf Mobile & Ohio Railroad*, 219 S. W. 2 322 (not yet officially reported). Copy of opinion (R. 165 *et seq.*). The opinion of the Supreme Court of Missouri on the first appeal is reported in 356 Mo. 633, 202 S. W. 2 904.

Jurisdiction

This action arose and was determined under the Federal Employers' Liability Act as amended by Act of August 11, 1939 (45 U. S. C. A. Sec. 51), for damages for personal injuries to Maxie while working as a carpenter in petitioner's general repair shop at Mobile, Alabama. The Missouri Supreme Court held that Maxie had a right of action under the Federal Employer's Liability Act by virtue of the 1939 Amendment thereto, and that he was entitled to invoke the *res ipsa loquitur* doctrine by reason of the circumstances shown by the evidence. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257 (3). The judgment of the Supreme Court of Missouri, the highest Court in the State of Missouri, was entered on the 14th day of March, 1949 (R. 164), and petitioner's motion for rehearing and to transfer from division to the Court en banc was denied by that Court on the 11th day of April, 1949 (R. 178), making the judgment final. Case believed to sustain jurisdiction is:

Wilkerson v. *McCarthy*, 1948, — U. S. —, 93 L. Ed. (adv.) 16.

Statute Involved

The pertinent provisions of the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51 *et seq.*) are set forth in the appendix.

Questions Presented

Respondent brought suit under the Federal Employers' Liability Act "as amended by Act of August 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. Sec. 51," alleging that part of his duties as a car repairer in petitioner's shop "was the furtherance of interstate commerce • • • and directly, closely, and substantially affected such commerce" (R. 3).

Petitioner denied that a part of respondent's duties were in furtherance of or directly, closely or substantially affected interstate commerce; and denied that the Federal Employers' Liability Act applied (R. 6, 7).

The evidence showed and the Supreme Court of Missouri found that respondent was regularly employed to work on freight cars that were withdrawn from service and brought to petitioner's shop to be repaired and rebuilt on tracks specifically designated for work on cars of such character, and that respondent's duties did not require him to work on any other cars nor to perform any other service.

We have for decision by this Court for the first time since the Act of August 11, 1939, c. 685, 53 Stat. 1404, the following Federal questions:

Questions

1. When railroad cars have been withdrawn from interstate commerce for general repairs and are neither fit for use in commerce nor designated for such use during repairs, is it within the intendment of the Federal Em-

ployers Liability Act that work devoted exclusively to the repair and rebuilding of such cars shall be considered the furtherance of interstate commerce or that such work directly or closely and substantially affects interstate commerce?

OR

Is an employee engaged in such work performing duties in furtherance of, or in any way directly or closely and substantially affecting interstate commerce?

2. In a case where an injured employee seeks to invoke the Federal Employers Liability Act, and where the defendant employer denies that the Act applies and introduces evidence to prove that the employee worked only in repairing and rebuilding cars that had been withdrawn from service, does defendant's denial and supporting evidence require that the question of whether or not the Act applies be submitted to the jury?

OR

Can the trial court, in such circumstances, instruct the jury that as a matter of law the plaintiff employee was at the time of injury engaged in interstate commerce or in the performance of duties in furtherance of interstate commerce?

3. Does Congress, by virtue of the commerce clause of the Constitution of the United States of America (Article I, Section 8, Clause 3), have the power to regulate master-servant relationships in repair shops of railroads engaged in interstate commerce, when the work performed in such shops is confined to work upon railroad cars and other instrumentalities of commerce which have been completely withdrawn from transportation service pending repairs

and which have no re-assignment in commerce until such time as repairs are completed?

OR

Would an Act of Congress regulating such a relationship be repugnant to the Constitution?

Statement

Respondent brought this action in a Missouri State Court under the provisions of the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51 *et seq.*) for injuries sustained when some heavy box-car doors fell upon and struck him, allegedly "as the result of negligence on the part of defendant" (Petitioner), (R. 3).

By its answer to respondent's petition, and on appeal to the Supreme Court of Missouri, petitioner denied that respondent was engaged in interstate transportation, denied that a part of respondent's duties was the furtherance of interstate transportation, or that any part of his duties directly, closely or substantially affected interstate commerce, and denied that respondent ever was subject to the Act at any time during his employment by petitioner (R. 7).

The case was tried before a Jury (R. 8).

The evidence showed and the Supreme Court of Missouri found the following facts:

> "Plaintiff (respondent) was employed by the railroad (petitioner) as a car repairer in its shops and yards at Mobile, Alabama. There, car repairs are separated into two general classes. Light and 'running' repairs to cars are both made on certain tracks assigned for that purpose. Repairs which require more than one day and up to three days are classified as light repairs, running repairs are those which can

be made the same day. These may be performed on loaded cars as well as on empty ones. Heavy repairs to cars are made on other tracks designated for that purpose. These include even rebuilding a car. Sometimes so-called heavy repairs can be done in three days at the minimum—generally more time is required. Cars on the heavy repair tracks usually remain there for a week. Plaintiff was assigned to work at heavy repairs. He was working on the repairs of a GM&O box car when he was injured. The railroad's records introduced by plaintiff described the work done on this car as 'heavy repairs and painted red.' The car came empty to the yards at Mobile from an interstate trip, remained on the heavy repair tracks there for a week, and then went out from the yards for loading and movement in interstate commerce." (R. 166).

Petitioner's evidence showed that all cars brought to the heavy repair track, where respondent worked, were "stripped down" and were not in condition while undergoing repair to be used in any kind of service. (R. 93, 106, 110-111, 114), and respondent testified that cars brought into the heavy repair tracks "weren't in condition to be moved out? • • • A. Not until they were repaired" (R. 134).

The trial court overruled petitioner's motion to direct a verdict in its favor (R. 139-140), and, over petitioners' objection gave instruction No. 1 which was as follows:

> "The Court has decided, as a matter of law, that at the time of plaintiff's injury he was engaged in interstate commerce or was engaged in the performance of duties in furtherance of interstate commerce. Therefore, you need not concern yourselves with that question." (R. 141).

The trial of the case resulted in a verdict and judgment for respondent for Thirty-two thousand dollars ($32,000),

which was reduced to Sixteen thousand dollars ($16,000) by remittitur (R. 158).

Upon petitioner's appeal, Division One of the Missouri Supreme Court affirmed the judgment (R. 164), and later overruled petitioner's Motion for rehearing or to transfer the case to the Missouri Supreme Court en banc (R. 178).

Basis of Opinion of the State Court

In passing upon the case, and as a basis for its decision that the case was governed by the provisions of the Federal Employers' Liability Act, the Supreme Court of Missouri made reference to its opinion on the first appeal, *Maxie* v. *Gulf, Mobile and Ohio Railroad Company*, 356 Mo. 633, 202 S. W. 2, 904, and aptly pointed out that in the present case petitioner "says our decision on the first appeal plainly misinterpreted and misapplied the 1939 Amendment of the Federal Employers' Liability Act. 45 U.S.C.A., § 51 *et seq.*

> "On the latter contention the railroad argues we held the 1939 Amendment has the effect of putting the box car into interstate commerce at the time plaintiff was repairing it when in fact it was withdrawn from such commerce while under heavy repair. The railroad draws that conclusion because we held that plaintiff who was engaged in performing heavy repairs on the box car was included under the Act as amended". (R. 167.)

The Court then said it "did not hold that the box car was being used in interstate commerce while it was in the yards under repairs," and continued with the statement that "such a finding is no longer necessary to the application of the act." (R. 168).

The Court held that respondent's duties were in furtherance of or closely affected interstate commerce, because he "was regularly employed in repairing and rebuilding

freight cars which came into the yards from interstate use and, after repair, went out of the yards into interstate use. So we ruled plaintiff's duties brought him under the act as extended by the Amendment because they were in furtherance of and closely affected interstate commerce.

"Since the undisputed facts on this appeal are the same as on that (first) one, we reach the same conclusion, and again rule plaintiff's duties brought him under the act as amended" (R. 168).

The Court affirmed the judgment against petitioners (R. 164), and overruled petitioner's motion to grant a rehearing or transfer the cause to Supreme Court of Missouri, en Banc (R. 178).

The above resume of the opinion of the Missouri Court shows that it is of the opinion that the mere showing that respondent was employed to work on freight cars that had been moved in interstate commerce, and that were returned to such commerce after respondent's work on them was completed and done, was sufficient to bring the Federal Employers' Liability Act into operation. The effect of the opinion is to find that no car on which plaintiff worked was, at the time, an instrumentality of interstate transportation, but that the Act applies because such cars once had been instrumentalities of interstate transportation, and, after being repaired, again became instrumentalities of interstate transportation.

Reasons for Granting the Writ

I

Since the Amendment of August 11, 1939, c. 685, § 1, 53 Stat. 1404, to the Federal Employers' Liability Act, 45 U. S. C. A. 51, *et seq.*, this Court has not had for decision an action for damages under the Act for injury to an

employee whose exclusive duties consisted of repairing and rebuilding railroad cars that had been withdrawn from interstate commerce for "heavy" or major repairs and that were not usable as instrumentalities of commerce while undergoing repair. Therefore, this Court has not directly passed upon the important question of whether the 1939 Amendment extends the provisions of the Act to such an employee. The opinion of the Missouri Court recognized that "The facts are not disputed" (R. 166); that "Heavy repairs are made on (other) tracks designated for that purpose;" that "heavy repairs can be done in three days at the minimum;" and that "plaintiff (respondent) was assigned to work at heavy repairs" (R. 166). That court also recognized "the undisputed fact" that the cars on which respondent worked were not being "used in interstate commerce" while under repair (R. 168), but held that a finding that the "car itself was being used in interstate commerce while it was in the yards under repair • • • is no longer necessary to the application of the Act" (R. 168). Then the Court found that because the cars on which respondent worked "came into the yards from interstate use and, after repair, went out of the yards into interstate use" respondent's duties "brought him under the act as extended by the amendment because they were in furtherance of and closely affected interstate commerce." (R. 168).

The Missouri Court refused to hold that before work on a car can be considered as the furtherance of interstate commerce, the car itself must at the time be an instrumentality of commerce.

This petition therefore raises substantial and important questions regarding the scope and extent of the Federal Employers' Liability Act, and especially whether the 1939 Amendment had the effect of extending the provisions of

the Act to an employee who was not engaged in interstate commerce and whose duties, before the Amendment, would not have been held to be the furtherance of interstate commerce, or to directly or closely and substantially affect such commerce.

The determination by the Missouri Court is unquestionably contrary to the manner in which this Court would have decided the case.

II

The determination by the Missouri Court that work on a freight car that has been withdrawn from service for general repairs is "in furtherance of" interstate commerce and that interstate commerce is "closely affected" thereby is in direct conflict with controlling decisions by this Court holding that equipment withdrawn from interstate commerce for repair does not give an interstate character to the work of repairing it. *Industrial Accident Commission of California* v. *Davis*, 259 U. S. 182, 66 L. Ed. 888; *Minneapolis & St. Louis Railroad Co.*, v. *Winters*, 242 U. S. 353, 61 L. Ed. 358; *Shanks* v. *Delaware, Lackawanna & Western Railroad Co.*, 239 U. S. 556, 60 L. Ed. 436.

III

In holding in the case of a car repairer that a finding that the cars which he repaired are being used in interstate commerce is not necessary to the application of the Federal Employers' Liability Act, the opinion of the Supreme Court of Missouri is in conflict with decisions of this Court and other Federal Courts.

Minneapolis & St. Louis Railroad Company v. *Winters*, 242 U. S. 353, 37 S. Ct. 170, 61 L. Ed. 358;

Industrial Accident Commission of the State of California v. *Davis*, 259 U. S. 182, 66 L. Ed. 888;

Sullivan v. *New York, N. H. & H. R. Co.* (C.C.A. 2), 74 Fed. (2d) 725.

IV

The opinion of the Supreme Court of Missouri holds that where a railroad car is removed from interstate commerce and taken to the general repair track to undergo general repairs, or even to be rebuilt, an employee who is injured while working on such car can invoke the provisions of the Federal Employers' Liability Act, because the car moved in interstate transportation on its way to the general repair track and re-entered interstate use after repairs on it were completed.

(a) Such holding is in conflict with controlling decisions of this Court and other Federal Courts.

Minneapolis & St. Louis Railroad Co. v. *Winters,* 242 U. S. 353, 37 S. Ct. 170, 61 L. Ed. 358;

Sullivan v. *New York, N. H. & H. R. Co.,* (C.C.A. 2), 74 Fed. (2d) 725;

New York, N. H. & H. R. Co. v. *Bezue,* 284 U. S. 415, 76 L. Ed. 370;

Rice v. *Baltimore & O. R. Co.,* (C.C.A. 6), 42F (2d) 387.

(b) Such holding is in conflict with decisions of the Supreme Court of Missouri.

Toussaint v. *Cleveland, C. C. & St. L. Ry. Co.,* 340 Mo. 578, 104 S. W. (2d) 263;

Oglesby v. *St. Louis-San Francisco Ry. Co.,* 318 Mo. 79, 1 S. W. (2d) 172.

(c) Such holding is in conflict with decisions of the Courts in other states.

Baird, et al. v. *New York Central R. Co., et al.,* (New York Supreme, App. Div.), 86 N. Y. S. (2d) 49;

Propst v. *Spitznagle, (Indiana Sup.)* 215 Ind. 402, 19 N. E. (2d) 263.

V

The interpretation of the 1939 Amendment to the Federal Employers' Liability Act which was adopted by the Supreme Court of Missouri rests upon a supposition that Congress has the power to regulate master-servant relationships between an interstate railroad and its employee when the duties of the employee are confined to repair work on cars completely withdrawn from interstate commerce pending repairs. Congress does not have that power, and such an interpretation renders the Act repugnant to the Constitution of the United States and is contrary to cases decided by this court.

Constitution of the United States, Tenth Amendment;
Howard v. *Illinois Central Railroad Company* and *Brooks* v. *Southern Pacific Company,* 207 U. S. 463, 52 L. Ed. 297;
Mondou v. *New York, N. H. & H. R. Co.,* 223 U. S. 1, 56 L. Ed. 327.

It is essential that this writ be granted in order to determine important questions involving the interpretation of the Federal Employers' Liability Act and particularly the Amendment of August 11, 1939, c. 685, §-1, 53 Stat. 1404, 45 U. S. C. A. § 51.

Prayer

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of this Court, directed to the Supreme Court of Missouri, commanding that Court to certify and send to this Court a transcript of the record in the case entitled, "James B. Maxie, respondent, v. Gulf, Mobile & Ohio Railroad Company, a corporation, appellant, Number 40768," including also the proceedings in the Missouri

Supreme Court, to the end that the cause may be reviewed and determined by this Court and the judgment of the lower court reversed.

RICHARD WAYNE ELY,
Tenth Floor, Commerce Building,
418 Olive Street,
St. Louis 2, Missouri,
Attorney for Petitioner.

D. S. WRIGHT,
G. M. & O. Building,
Mobile 5, Alabama;
L. DUNCAN LLOYD,
135 S. LaSalle St.,
Chicago, Illinois;
ROBERT C. ELY,
418 Olive Street,
St. Louis 2, Missouri,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of Case

The facts with reference to the opinion of the Missouri Court, jurisdiction of the Court, and the statute involved have been sufficiently covered in the petition for certiorari and will not be here repeated. The issues, the pleadings, and the evidence have been stated, so that further reference to them will not be made at this point.

Specifications of Error to Be Urged

The Supreme Court of Missouri erred:

1. In holding that the Federal Employers' Liability Act applies in the case of a car repairer whose duties are confined to repairing and rebuilding railroad cars that are withdrawn from interstate commerce and are not instrumentalities of commerce while being repaired.

2. In holding that the 1939 Amendment to the Federal Employers' Liability Act extended the provisions of the Act so as to include an employee who was not employed in interstate commerce, and no part of whose duties would have been considered before the Amendment as the furtherance of interstate commerce or to directly or closely and substantially affect such commerce.

3. In holding that since the Amendment of August 11, 1939, to the Federal Employers' Liability Act, a finding that the duties of a carrier's employee require him to work on a railroad car or other instrumentality that is being used in interstate commerce is no longer necessary to the application of the Act.

4. In holding that a railroad car which has been withdrawn from interstate commerce can give an interstate character to the work of repairing it.

5. In allowing recovery under the Federal Employer's Liability Act in a case where the employee was not employed in interstate commerce, and where no part of the employee's duties were in furtherance of or in any way directly or closely and substantially affected interstate commerce.

6. In permitting judgment to stand when in order to do so it was necessary to extend the scope of the Federal Employers' Liability Act beyond the constitutional limits of the power of Congress to regulate interstate commerce.

ARGUMENT

I

All of the Cars upon Which Respondent Worked Had Been Removed from Interstate Commerce; Therefore No Part of Respondent's Duties Were in Furtherance of or in Any Way Directly or Closely and Substantially Affected Interstate Commerce.

The respondent, James Bodie Maxie, filed his petition in the Circuit Court of the City of St. Louis, Missouri, alleging therein that the petitioner, Gulf, Mobile and Ohio Railroad was an interstate carrier and further alleging that a part of respondent's duties as an employee of petitioner "was the furtherance of interstate commerce, to-wit, the interstate transportation business of defendant, and directly, closely and substantially affected such commerce, and, that, therefore, plaintiff and the defendant were then and there subject to * * *" the Employers' Liability Act as amended

on August 11, 1939, C. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. Sec. 51 (R. 3).

Petitioner, admitted that it was an interstate carrier but denied that a part of respondent's duties as petitioner's employee was the furtherance of interstate commerce, or the interstate transportation business of petitioner, or directly, closely or substantially affected interstate commerce, and denied that respondent and petitioner were subject to the Employers' Liability Act at the time of the occurrence complained of in respondent's petition.

After a trial on the issues, the Missouri trial court instructed the jury that as a matter of law the Act did apply to the case (R. 141), and the case was thereupon submitted to the jury with a resultant verdict for the respondent, assessing money damages against defendant for personal injuries sustained, and judgment was entered.

Subsequently, petitioner appealed to the Supreme Court of Missouri, and respondent's judgment was affirmed. It is that affirming opinion which gives rise to this petition for certiorari.

This same case had previously been before the Missouri Supreme Court on appeal by petitioner, and respondent's judgment was then reversed and remanded upon a point of law not under consideration here. *Maxie* v. *Gulf, Mobile & Ohio Railroad Co.*, 356 Mo. 633, 202 S. W. 2 904. However, upon the first trial of the case the trial court had ruled in a like manner as to the application of the Act, and the Missouri Supreme Court affirmed the giving of an instruction identical to the one given upon this second trial. In the opinion under consideration the Missouri Supreme Court adopted and affirmed its original ruling with added explanations for its findings of law.

In the opinion the court held that the facts, bearing upon the application of the Act, were undisputed and outlined them as follows:

> "Plaintiff was employed by the railroad as a car repairer in its shops and yards at Mobile, Alabama. There, car repairs are separated into two general classes. Light and 'running' repairs to cars are both made on certain tracks assigned for that purpose. Repairs which require more than one day and up to three days are classified as light repairs. Running repairs were those which can be done the same day. These may be performed on loaded cars as well as on empty ones. Heavy repairs to cars are made on other tracks designated for that purpose. These include even rebuilding a car. Sometimes so-called heavy repairs can be done in three days at the minimum—generally more time is required. Cars on the heavy repair tracks usually remain there for a week. Plaintiff was assigned to work at heavy repairs. He was working on the repairs of a GM&O box car when he was injured. The railroad's records introduced by plaintiff described the work done on this car as 'heavy repairs and painted red'. The car came empty to the yards at Mobile from an interstate trip, remained on the heavy repair tracks there for a week, and then went out from the yards for loading and movement in interstate commerce." (R. 166)

From the above statement of the controlling facts, the Missouri Supreme Court held that the disputed instruction was properly given by the trial court. Petitioner firmly believes that the instruction does not follow the applicable law and that the Supreme Court of Missouri erred in its ruling. Petitioner on its appeal relied upon those cases decided by this Court upon facts arising before 1939, which cases held that work done on general repair tracks maintained by interstate railroads did not

come under the purview of the Federal Employers' Liability Act, and petitioner asserted that the 1939 amendment to the Act did not supersede the law of those cases. In dealing with that view of the law, the Supreme Court of Missouri recognized that before the 1939 amendment the work done by respondent would not have been considered as being within the Act (R. 167-8), but the court held that the amendment expanded the field covered by the Act so that the work of respondent was included. The court recited that the Act as amended now covers:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (R. 168.) *Federal Employers' Liability Act,* C. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. Sec. 51 *et seq.*

The Missouri Court reasoned that since the cars on which respondent worked came into the yards from interstate use, and after repairs went out of the yards into interstate use, that therefore respondent's work upon the repairs of those cars was in furtherance of and closely affected interstate commerce, and the 1939 Amendment therefore made the Act applicable to the case. This is the meat of the controversy. The Missouri Court has based its decision upon events transpiring before and after the period of removal to the general repair tracks but has not concerned itself with the period of removal itself. The court has not considered the commercial character of the cars during the time that they were undergoing repairs; yet respondent's work was admittedly confined to repair work, and his duties did not lead him into work which was done on

those cars when they were moving in interstate transportation either before or after repairs.

It is petitioner's contention that those cars upon which respondent worked did not have an interstate character during the time that they were on the heavy repair tracks, and that it must necessarily follow that respondent's duties, being confined to repair work on cars which were not instrumentalities of interstate transportation or commerce, were not in furtherance of and did not closely and substantially affect interstate commerce—as the opinion of the Missouri Court has held. The Court itself accepted petitioner's claim that the cars were not instrumentalities of interstate commerce, in the following language—referring to its first published opinion in the case:

> "We did not hold the box car itself was being used in interstate commerce while it was in the yards under repair. Such a finding is no longer necessary to the application of the Act." (R. 168).

While the above language is not so definite as to say that the cars were not instrumentalities of interstate transportation, the meaning of the sentence is clear, and we propose to demonstrate that under the law the cars had no commercial character whatsoever while they were undergoing repairs.

Before the 1939 Amendment those cases involving facts similar in legal import to the facts of the case at bar were often decided upon technicalities, and fine lines of distinction were drawn; however the law resolved itself to a point where under a given set of facts, the courts could determine whether or not a particular car was an instrument of interstate commerce at the moment of injury to an employee engaged in work upon that particular car. Petitioner recognizes that the "moment of injury test" was done away with by the 1939 Amendment; however, that statutory

change did not wipe out all of the law which was declared by the above mentioned class of cases. Those cases are still good law in the determination of whether or not a particular car was an instrumentality of interstate commerce during a given period of time. The period of time which concerns us here begins with the time when cars were brought onto the tracks where plaintiff worked and ends at that time when the cars were given assignments and were returned to use in commercial transportation. Under the authority of those cases decided on facts arising before the Amendment, the facts recited by the Missouri Supreme Court can lead only to a conclusion that all of the cars upon which the respondent worked had been removed to the repair tracks, "a definite withdrawal from service and placement in new relations—the relations of a workshop."

The above quotation was taken from the case of *Industrial Accident Commission of the State of California* v. *James C. Davis,* 259 U. S. 182, 66 L. Ed. 888, decided by this court in 1922.

In that case an engine was taken from use in interstate commerce and sent to a shop for repairs. The plaintiff was an employee in the repair shop and while working on that engine he was struck in the eye by a piece of steel. He applied for compensation under the state law, and the defense was made that he was engaged in interstate commerce when injured. The evidence showed that the engine was sent to the shop December 1, 1918, for general overhauling, during which operation it was to a certain extent dismantled and stripped. The work was completed approximately three months later. The Commission made an award in the plaintiff's favor, but was reversed by the California Court of Appeals. Upon a Writ of Certiorari to this Court, the Court of Appeals was reversed, this

Court finding, as a matter of law, that the plaintiff was not in interstate commerce within the meaning of the Act. The Court reasoned as follows:

> "The Federal Act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement —indeed, are necessary to it; but so are all attached to the railroad company—official, clerical, or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the Federal Act. And there is a difference in the instrumentalities. In some, the tracks, bridges, and roadbed and equipment in actual use, may be said to have definite character, and give it to those employed upon them. But equipment out of use, withdrawn for repairs, may or may not partake of that character, according to circumstances; and among the circumstances is the time taken for repairs—the duration of the withdrawal from use. Illustrations readily occur. There may be only a placement upon a sidetrack or in a roundhouse—the interruption of actual use and the return to it, being of varying lengths of time; or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations—the relations of a workshop—its employments and employees having cause in the movements that constitute commerce, but not being immediate to it.

"And it is this separation that gives character to the employment, as we have said, as being in or not in commerce. Such, we think, was the situation of the engine in the present case. It was placed in the shop for general repairs on December 19, 1918. On February 25, 1919, after work upon it, it was given a trial, and it was placed in service on March 4, 1919. The accident occurred on February 1st of that year, the engine at the time being nearly stripped and dismantled. 'It was not interrupted in an interstate haul to be repaired and go on.' *Minneapolis & St. L. R. Co.* v. *Winters*, 242 U. S. 353, 356, 61 L. Ed. 358, 359, 37 Sup. Ct. Rep. 170, Ann. Cas. 1918 B, 54, 13 N.C.C.A. 1127; *Chicago, K. & S. R. Co.* v. *Kindlesparker*, 246 U. S. 657, 62 L. Ed. 925, 38 Sup. Ct. Rep. 425."

Industrial Accident Commission v. *Davis*, supra, L. C. 259 U. S. 187, 188; 66 L. Ed. 892.

The Court there took its cue from the *Winters* case, in which the Court said:

"An engine, as such is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in any interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

Minneapolis & St. Louis Railroad Co. v. *Winters*, 242 U. S. 353, 37 S. Ct. 170, 61 L. Ed. 358, 359, Ann. Cas. 1918 B 54.

This court recognized that all employees of most railroads were engaged in some work affecting interstate

commerce. However, the Court, in interpreting the Employers' Liability Act, realized and held that the Act was not intended to and did not include all employees, but only those engaged in transportation of interstate commerce.

> "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the Act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see Swift & Co. *v.* United States, 196 U. S. 375, 398, 49 L. Ed. 518, 525, 25 Sup. Ct. Rep. 276), and that the true test of employment in such commerce in the sense intended is, was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"
>
> *Shanks* v. *Delaware, Lackawanna & Western Railroad Co.*, 239 U. S. 556, 558; 60 L. Ed. 436, 438.

In commenting upon the use of the word "Transportation," this Court said:

> "It will be observed that the word used in defining the test is 'transportation,' not the word 'commerce.' The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrow signification was chosen understandingly and deliberately as the appropriate term."
>
> *Chicago & Northwestern Ry. Co.* v. *Bolle*, 284 U. S. 74, 78; 76 L. Ed. 153, 176.

II

Congress Intended to Do Away With the "Moment of Injury" Test But Did Not Intend to Alter Those Elements Which Constitute "Interstate Commerce."

It was not the intention of Congress that the 1939 Amendment should change the law as declared by the cases cited under Point I. The Amendment was passed in order to do away with the perplexing "moment of injury" test and to provide uniform treatment for those employees whose duties caused them to shift from work in furtherance of interstate commerce to work which was not covered by the Act. The Amendment was proposed through the Senate Committee on the Judiciary. That committee, which drafted the language of the Amendment, issued the following short but revealing report telling why the Amendment was needed and what effect it was intended to have on the law as it then existed:

> "This Amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.
>
> "The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, 'in transportation or work so closely related to it as to be practically a part of it.' (Shank *v.* D., L. & W. R. R., 239 U. S. 556).
>
> "In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure

the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.

"As a result of the uncertainty which exists in borderline cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had.

"Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

"The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the Act.

"The preponderance of service performed by railroad *transportation* employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." (Emphasis ours.)

Senate Reports, 76th Congress 1st Sess., Rep. No. 661.

The language of the committee report clearly demonstrates that the Amendment was intended solely for the purpose of doing away with the "moment of injury" test, which was expounded in the Shanks case—cited in the report. It lends no aid to the theory advanced by the Supreme Court of Missouri to the effect that a unit of work which previously was not covered by the Act is now included within the Act's provisions. In its First opinion, the Missouri Court held:

> "We may concede that (prior to the 1939 Amendment) the freight cars receiving heavy repairs on the repair track 'were dead in the yards' (not in use in interstate transportation) during the course of such repairs."
>
> *Maxie* v. *GM & O*, 202 S. W. (2d) 904, 907; 356 Mo. 633, 640.

Certainly the amendment was not designed to and does not now affect the elements which when gathered together constitute interstate commerce. If the cars on which respondent worked would have been considered as not in use in interstate commerce before 1939, then surely they were not in use in interstate commerce when plaintiff was working on them in 1943. If Congress had intended to change the makeup of interstate commerce, as a legal conception, it would have so expressed itself, in clear terms.

III

The Cases Construing the 1939 Amendment Are in Definite Conflict and This Court Has Not Passed upon the Questions Here Presented.

Your petitioner does not assert that the Missouri Court is in discord with all other decisions, but instead petitioner recognizes that the question here presented has been decided both ways, resulting in a conflict of decisions which can be resolved only by this Court. The conflict has been noted by the Supreme Court, Appellate Division, of the

State of New York in the case of *Baird et al* v. *New York Central R. Co. et al.*, 86 N. Y. S. 2 49. The case considers the claims of three employees, which claims are based upon facts very nearly identical with those of the case at bar. Baird was a blacksmith, the other two were machinists. The work of all three was confined to locomotives that had been withdrawn from immediate service, were disabled, without power, and would not be reassigned until after repairs were completed. These men had no contact with any equipment which was in immediate use in any commerce. Most of the locomotives brought into the shop came out of and were eventually returned to interstate commerce. The three employees were granted awards by the state Workmen's Compensation Board, and the New York Supreme Court, Appellate Division, upheld the awards, stating that the 1939 Amendment was not designed nor intended to include employees such as these. The court quoted from the report of the Senate Judiciary Committee and then went on to say:

> "It seems clear from the foregoing that the Congress, in adopting the amendment, never intended thereby to include employees such as these claimants, whose employment at no time was of interstate character, simply because they were employed in a shop where interstate equipment was from time to time laid up for repairs. It must be borne in mind that even under the amendment the duties of the employee must still be in furtherance of interstate commerce. 'Commerce' in this sense has long been interpreted as meaning 'transportation' and the test has been whether the employee's work was directly related to the interstate movement of persons and things in commerce. Chicago & Northwestern Ry. Co. *v.* Bolle, 284 U. S. 74, 52 S. Ct. 59, 76 L. Ed. 173. Work in repair shops on 'dead' engines or other equipment withdrawn from service has never been considered as coming within this definition and test. McGowan *v.* New York Central R. R. Co. 290 Y. Y. 889, 50 N. E. 2d 295. Although the amendment of 1939 did away with the requirements of the earlier cases that the employee must be engaged

in interstate commerce at the very moment of injury, it did not eliminate the necessity that his duties at some time or other must be in furtherance of such commerce. If the machinist at his bench and the blacksmith at his forge are to be included, we are in effect, holding that every employee of any carrier engaged in interstate commerce comes within the provisions of the amendment and are disregarding entirely the requirement that some part of his duties shall be in furtherance of or shall directly or closely and substantially affect such commerce. The effect of any such interpretation is of course obvious. We are depriving these three claimants and many more residents of this State of the benefits of the Workmen's Compensation Law solely because, through necessity or choice, they happen to work for an employer engaged in interstate commerce, and we are doing it in the face of the Tenth Amendment to the Federal Constitution, wherein it is written, 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' "

Baird et al v. *New York Central Railroad Co. et al*, 86 N. Y. S. (2d) 49.

The effect of the decision in this case was to uphold the employees' right to compensation under the state law. For argument we assume that the facts surrounding the employees' injuries did not include negligence of the Railroad employer and that therefore without workmen's compensation the employees would have had no remedy at law. If this present petition is denied, many employees will in the future be denied any remedy at law; while if it is granted and this Court shall reverse the Missouri Court, all railroad employees suffering injuries in these "back shops" will have the remedy afforded them by the Workmen's Compensation Acts of the various states of the union.

The decision of the New York Supreme Court, Appellate Division, in the *Baird* case was appealed to the New York Court of Appeals, and that court in a very recent decision entered May 26, 1949, has reversed the Appellate Division and has held that the 1939 Amendment made the Act applicable to the claimant-employees and that the Workmen's Compensation Commission had no power to make awards to those men (*In the Matter of the Claims of Fred Baird et al, Respondents* vs. *New York Central Railroad Company, appellant, Workmen's Compensation Board, Respondent*, — N. Y. —, —, N. E. ——). The New York Court of Appeals there reasoned that Congress intended to change both the "pin point" rule (moment of injury test) and the "Back shop" rule (as declared by the *Davis* and *Winters* cases, supra). The Court held that there could be no doubt that the "pin-point" rule was completely and clearly abolished and that the report of the Senate Judiciary Committee clearly demonstrated that Congress so intended; however the court went further and stated that a reading of the report discloses "no equally plain indication as to whether other border-line cases, such as those of 'backshop employees' were being considered and dealt with," and the court found that "as a practical matter we are left with nothing but the language of the amendment itself." In concluding that the "back-shop" rule was changed, the New York Court of Appeals cited the decision of the Supreme Court of Missouri in *Maxie* v. *Gulf, etc.*, 356 Mo. 633, which is the case at bar, and other cases as demonstrating the trend of decisions, but the court failed to consider the arguments advanced by the Appellate Division of the Supreme Court of its state and disregarded the mention made in the lower court of the Tenth Amendment to the Federal Constitution (which is dealt with under Point IV of this argument.)

The court did, however, state that "the exact question • • • has not been answered in any controlling case," and for that reason alone, in view of the important federal questions involved this petition should be granted.

IV

The Supreme Court of Missouri Has Extended the Federal Employers' Liability Act Beyond the Constitutional Powers of Congress to Regulate Interstate Commerce.

The first Federal Employers' Liability Act was passed by Congress in 1906, (34 Stat. at L. 232, Chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891). That act, although entitled differently from the present statute, was substantially the same in import as the present Act except that it was made applicable to all operations of a carrier engaged in interstate commerce, without a requirement that the carrier and its employee be engaged in interstate commerce at the time of injury to the employee. In the companion cases of *Howard* v. *Illinois Central Railroad Company* and *Brooks* v. *Southern Pacific Company*, 207 U. S. 463 52 L. Ed. 297, this Court was called upon to determine the constitutionality of that Act.

The Court held that the Act to be unconstitutional in that it exceeded the legislative powers delegated to Congress. The illegal feature of the Act rested in the fact that its language clearly demonstrated congressional intent to regulate all master and servant relationships of railroads and their employees even though the relationship might be confined to acts other than interstate commerce. In passing upon the question presented, this Court stated:

> "A few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad

engaged in interstate commerce, having a purely local branch operated wholly within a state. *Take again the same road having shops for repairs,* and it may be, for construction work, as well as a large accounting and clerical force * * *

"As the Act thus includes many subjects wholly beyond the power ~~the power~~ to regulate commerce, and depends for its sanction upon that authority, it results that the Act is repugnant to the Constitution * * *." (emphasis ours). *Howard* v. *Ill. Cent. R. Co.*, supra, l. c. 207 U. S. 498, 499, 52 L. Ed. 309.

In holding the first Act unconstitutional this Court recognized that repair shops were an illustration of an operation wholly independent of interstate commerce, and the intent and effect of the decision was to hold that Congress had no power to regulate master-servant relationships in such operations. Undoubtedly the repair shops of which the Court then spoke were and are those shops where cars and other instrumentalities have been removed from all commerce pending heavy or general repairs. In the case at bar we are concerned with such a repair shop relationship, and it must necessarily follow that if the present Act as amended is to be interpreted to include a subject previously held to be without the power of Congress to regulate, then the present Act as amended is unconstitutional. The Supreme Court of Missouri, in the case at bar, has interpreted the Amended Act to include that forbidden subject of Federal legislation. Its decision cannot be permitted to stand. The present act is constitutional and without the 1939 Amendment has been so held by this Court in the case of *Mondou* v. *New York, N. H. and H. R. Co.*, 223 U. S. 1; 56 L. Ed. 327. The Court then said:

"In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the

> exertion of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the Constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged."

l.c. 223 U. S. 49; 56 L. Ed. 345.

In that case this Court recognized the limitations prescribed by the constitution and the fact that there must be a real or substantial connection with interstate commerce. In many cases such as the *Davis* case, the *Winters* case and others cited earlier herein, this Court has held that repair work on instrumentalities removed from commerce has no such real or substantial connection with interstate commerce, and the *Howard* case has listed repair shops as one of the operations which are wholly independent of interstate commerce and which cannot be regulated by Congress.

The interpretation of the 1939 Amendment which was adopted by the Missouri court is repugnant to the *Davis*, *Winters* and other cases; and particularly, the interpretation, under the law as declared by the *Howard* case, would render the Amendment unconstitutional. This petition for certiorari should therefore be granted in order that this Court may expunge the repugnant law declared by the Missouri Court.

Conclusion

Your petitioner urges that the Missouri Court has erred in its interpretation, and further urges that the question presented is of great import in the federal law; wherefore your petitioner respectively fully prays that the Court grant

this petition for certiorari to the Supreme Court of Missouri to the end that the decision of the Supreme Court of Missouri be reversed and that the existing conflict in decisions be resolved.

RICHARD WAYNE ELY,
Tenth Floor, Commerce Building,
418 Olive Street,
St. Louis 2, Missouri,
Attorney for Petitioner.

D. S. WRIGHT,
G. M. & O. Building,
Mobile 5, Alabama;
L. DUNCAN LLOYD,
135 S. LaSalle St.,
Chicago, Illinois;
ROBERT C. ELY,
418 Olive Street,
St. Louis 2, Missouri,
Of Counsel.

APPENDIX

The Federal Employers' Liability Act

The pertinent provisions of the Federal Employers' Liability act (45 U. S. C. A., Sec. 51, et seq.) are as follows:

Sec. 51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE: DEFINITION OF EMPLOYEES

Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee: * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as entitled to the benefits of this chapter. Apr. 22, 1908, C. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.